The Nevada Law Bulletin is a review of legal news and developments affecting the Nevada law firm of Erickson, Thorpe & Swainston, Ltd. and our clients.

Nevada Law Bulletin

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New Ninth Circuit Case: *Immigration Status & Employer Action*

EMPLOYERS BEWARE: termination for loss of legal work status may constitute retaliation in the Ninth Circuit.

In March 2007 the Ninth Circuit rendered an opinion in the case of *Incalzala v. Fendi North America*, 479 F.3d 1005 (9th Cir. 2007), in which it addressed the issue of employer responses to a change in an employee's previously-legal immigration status. The decision is important to remember when facing circumstances where an employee's once-legal work status has lapsed.

Giancarlo Incalza was a long-time employee of the Fendi company. Initially, he worked in Rome, and then was offered a position in Fendi's New York City Store. *(Continued on Page 4).*

New Electronic Evidence Rules Adopted

New provisions of the Federal Rules of Civil Procedure, which govern many Nevada cases and are also looked to by Nevada's State Courts, went into effect on December 1, 2006. These new rules require parties in litigation to protect, maintain and, ultimately, produce electronic information relevant to the litigation. As discussed in the following article, these new requirements present substantial new challenges for attorneys and their clients.

Under the new rules and recent court decisions, a company must take immediate steps to preserve evidence as soon as it is reasonably clear the possibility of litigation exists. At that time a "litigation hold" must be placed on all relevant documents and electronic information to eliminate the possibilty of recycling, overwriting, or otherwise destroying any relevant electronic information. This includes email and email backup, as well as all other stored electronic documents and information.

While the rules do not explicitly change the duty for parties to retain all relevant information, the new focus on electronic records and their preservation may give rise to additional areas of difficulty for companies and their attorneys. Basically, the new rules require what the rules have always required – that parties preserve all relevant documents no matter what the format.

Whether or not such information will need to be disclosed and whether or not it would ultimately be admissible in court are open questions; however, the need to preserve all relevant information is clear. The reason for such a mandate is to preserve the right to make objections.

The failure to take sufficient steps to protect and preserve relevant information could result in sanctions such as the following:

- The most extreme result could be entry of judgment against the party violating the rules;

- Jury Instructions allowing the jury to presume missing documents were intentionally destroyed and are adverse to the destroying party:

- Preclusion of the introduction of favorable evidence on related issues; or

- Fines or other penalties.

Furthermore, the obligations imposed by the new rules do not end with the imposition of the initial litigation hold. Additional analysis and review of computer storage systems, software and backup procedures must be undertaken as well. The failure to store and protect relevant information in a segregated manner could lead to a "fishing expedition," a situation that can be avoided if companies work with their attornies and IT professionals to establish appropriate procedures in advance.

ALSO IN THIS ISSUE:

- **Important new Nevada Supreme Court decisions**
- **Construction Defect Information • Employment Law Updates**
- **Asserting several liability as an affirmative defense**

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ETS News & New Additions

Brent Ryman

Brent L. Ryman has become a partner with Erickson, Thorpe & Swainston. Brent is a 2003 graduate of the University of Cinncinnati College of Law, whose practice focuses on the representation of public and private employers in Nevada and California.

Ann Alexander has become associated with the firm. In addition to being licensed to practice law in Nevada and California, Ann holds a Ph.D. in education from the Unviersity of Arizona. She was the Assistant Director of Special Education for the Nevada Department of Education from 1990 to 2000, and is recognized across the country as a leading expert in special education law. Ann will forcus her practice on the defense of school districts and other employers in special education and discrimination suits.

Paul Landis, a recent graduate of the Seattle University School of Law, has also joined the firm. Paul will work primarily in the area of construction defect litigation.

Nevada Legal Roundup:

A review of recent decisions shaping Nevada law

Arata v. Faubion

Arata v. Faubion, 123 Nev. Adv. Op. No. 19, challenged the constitutionality of N.R.S 41.440 which imposes vicarious liability upon the owner of a vehicle for acts of negligence committed by another family member. Under N.R.S. 41.440, the liability of the driver of a motor vehicle is imposed upon the owner of that vehicle if the driver is the wife, husband, son, daughter, father, mother, brother, sister or "other immediate family member" so long as the person operating that vehicle has the consent (express or implied) of the vehicle owner.

Arata struck and severely injured a pedestrian while driving a vehicle owned by his mother and step father. Although Arata was 19 years of age, he was living in the home of his mother and step father. Following a trial, the plaintiff was awarded $5 million in damages which was reduced by the court to $3.5 million due to a pretrial agreement. The parents appealed, claiming N.R.S. 41.440 was unconstitutional and that they were not "family members" under the statute because the 19-year-old driver was emancipated.

The Nevada Supreme Court disagreed, finding that not only was the statute constitutional, but that the liability of the owner of the vehicle did not depend upon whether the operator of the vehicle was dependent, emancipated, adult or otherwise. Thus, the mother of the vehicle operator was liable as a matter of law. As far as the stepfather was concerned, the Supreme Court concluded that the district court erred when it ruled, as a matter of law, that the step father was an "other immediate family member." The Court sent the case back to district court to determine whether the stepfather fell within this definition.

Notably, the Supreme Court gave no indication on what factors or test should be employed to determine whether a person meets this standard. We can only presume that the more the relationship resembles a typical family relationship, the more likely it is that it will be deemed to constitute an "other immediate family member."

This statute creates tremendous exposure for the owners of a motor vehicle. One should keep in mind that there is no cap on the potential exposure for acts of negligence.

Nevada Yellow Cab v. Eighth Judicial

The Nevada Supreme Court recently clarified its views on the nature of the relationship between an insurer and the counsel retained by an insurer to defend its policyholders against claims brought by third parties. In *Nevada Yellow Cab v. Eighth Judicial District Court*, 152 P.2d 737 (Nev. 2007), the Court expressly adopted the position that, in the absence of an actual conflict, attorneys represent not only the insured, but also the insurer who hired counsel. Thus, both the policyholder and the insurer are – effectively – defense counsel's clients.

On a practical level, this means defense counsel has a duty to maintain confidential information learned from either source. Further, counsel owes a duty of care, in offering legal advice, to both the insurer and its policyholder. The *Yellow Cab* decision reaffirms that insurers can assert attorney-client or work product privileges for documents prepared during the representation of the insured.

This dual-representation principle remains viable so long as any conflict remains only "speculative." Should an actual conflict arise during the course of the litigation, the attorney-client relationship reverts to a connection solely between counsel and the insured. Disqualification of counsel is also possible. The *Yellow Cab* decision could be a first step towards an eventual adoption of the California "Cumis" Counsel Standard, whereby in the event of an actual conflict, the insurer must pay reasonable counsel fees for an independent defense attorney.

Nevada Legislative Update – Construction Defect

Senate Bill 279 (Chapter 247) – revised certain duties and powers of the State Contractor's Board, to include providing express authority for the Board to collect and maintain data regarding investigations and complaints on contractors and to

conduct investigations of contractors; revising the procedures for applying for the issuance and renewal of a contractor's license; revising the term of a contractor's license from one to two years under certain circumstances; and authorizing the Board to take certain actions against unlicensed persons who violate a provision governing contractors, including administrative sanctions.

Senate Bill 243 – requires an affidavit and an expert report in an action against certain design professionals involving nonresidential construction, an additional requirement that is already in place for civil litigation involving residential construction. This becomes effective on October 1, 2007.

Asserting Several Liability as an Affirmative Defense

Generally, in tort actions for personal injury, wrongful death or property damage, a fault-free plaintiff may hold multiple defendants jointly liable and collect the entire judgment from one or from all. However, NRS 41.141 provides for a different result in those cases where comparative negligence is alleged against the plaintiff. In such a case, the plaintiff may not hold multiple defendants jointly liable for the entire judgment and each defendant is only severally liable for that portion of the judgment representing his specific percentage of negligence.

There are certain exceptions to this rule. For example, multiple defendants will still be jointly liable regardless of whether the plaintiff is also at fault in cases involving strict products liability, intentional torts and toxic torts. In those cases, several liability is not available to reduce a defendant's share of the total liability. In the ordinary negligence case, however, a defendant seeking the protection of several liability must be careful to properly place the plaintiff on notice of his intent.

Recently, the Nevada Supreme Court held – in an unpublished decision – that a defendant who wishes to avoid joint liability under the provisions of NRS 41.141 must now set forth several liability as an affirmative defense in his Answer. *See, Levy v. Watts, No. 42156, May 17, 2006 (WL 2167169).* If the Answer does not include an affirmative defense for several liability, the defendant will have waived his right to restrict enforcement of the judgment against him to that amount that equates to his degree of fault and will be jointly liable for the entire judgment, even though the plaintiff may be negligent himself.

Three-Justice Panels Aid Nevada Supreme Court's Calendar

Nevada is one of 11 states in the country with no intermediate court of appeals. As such, the seven justices of the court are faced with having to dispose of some 2000 matters annually. Although a move is underway to adopt an intermediate court in Nevada, at present the Supreme Court has devised a method to handle the overwhelming caseload through the use of "panels."

Although the full court consists of 7 members, court rules now allow the court to consider and dispose of cases by using a panel of three justices. Panels sit in both Northern and Southern Nevada which also makes it more convenient for attorneys to appear before the Court.

The decision of the panel is final. However, under certain limited circumstances, the full court, sitting "en banc," may reconsider a panel decision. The Court will only grant en banc review to maintain uniformity of decisions between the panels or if the decision involves "a substantial precedential, constitutional or public policy issue." To date, the Court has granted en banc review in only a limited number of cases.

The Nevada Law Firm

The Nevada law firm of ***Erickson, Thorpe & Swainston, Ltd.*** *was founded in 1969. It has been awarded the prestigious "AV" rating of the Martindale Hubbell Law Directory and has been recognized for its high legal standards and ethics by its listing in The Bar Register of Preeminent Lawyers. The firm also appears in A.M. Best's Directory of Recommended Insurance Attorneys, a unique and reputable study of the premier defense trial firms. The firm emphasizes civil litigation and practices in all state and federal courts of Nevada and the Eastern Sierra counties of California.*

Erickson, Thorpe & Swainston, Ltd. offers committed support in all phases of commercial and civil litigation, including labor and employment law and associated preventative employment services. We provide the experience necessary to meet our clients' expectations for an effective, efficient and timely resolution of their conflicts and issues. Our continued success in this highly competitive market demonstrates our widely recognized ability to deliver satisfaction and positive outcome to those who give us their trust – our clients.

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Employment Seminar

Please join us for the *all-new, Fall 2007 Employment Law Update,* presenting critical information for our employment-law clients.

SAVE THE DATE!!!

- **Thursday, October 4, 2007**
- **1:00 to 4:00 p.m.**
- **ALL-NEW PRESENTATION**
- **APPETIZERS & WINE**

Topics will include unraveling Nevada's wage & hour mystery in light of the federal minimum wage increase; how to develop an appropriate document retention plan; and conducting investigations upon receipt of internal and external complaints. The firm will provide additional time for a panel of ETS attorneys to answer specific questions on burning HR issues facing your businesss.

Please contact Rebecca Bruch at rbruch@etsreno.com or (775) 786-3930 to preregister. Formal invitations can be expected in mid-August 2007.

Immigration Status & Termination

(Continued from Page 1).

He accepted, and Fendi assisted in obtaining an E-1 Visa. He worked in New York for 10 years, during which he was continually assisted in Visa renewal by Fendi.

In August of 2000, Incalza was promoted to manager of Fendi's Beverly Hills store. It soon became clear his new supervisor did not like him and wanted to replace him. In 2002, Fendi was sold to a French company, rendering the E-1 visas of two employees invalid. To cure this defect, Fendi filed an H1-B petition for one employee, but did not do so for Incalza. The H1-B petition was granted without problem for the other employee, who remained on Fendi's payroll. Incalza, on the other hand, was fired and told nothing could be done.

Incalza requested a leave of absence, because he was marrying an American citizen in a few weeks and anticipated receipt of a green card at that time. Fendi, however, denied the request, and Incalza filed suit.

Fendi argued that, pursuant to the Immigration Reform and Control Act (IRCA) – which prohibits employers from hiring or employing persons not legally entitled to work in this country – it had no choice but to fire Incalza. The Court disagreed, ruling Incalza was discharged for reasons other than his immigration status. The Court ruled that "Fendi could lawfully have taken action other than discharge and still been in compliance with IRCA." If Fendi had granted Incalza's request for a leave of absence, the Court reasoned, he would not have been employed by the Company and Fendi would not be in violation of IRCA.

The Court went on to explain that placing employees on unpaid leave for a time is consistent with the purpose of IRCA, which Congress intended to have the secondary effect of protecting the rights of lawful alien workers.

Key to the Court's analysis was the fact that Incalza had, except for a short time, been authorized to work at all times. The Court focused on the theory Fendi could have suspended Incalza without pay for a reasonable period while he obtained the change in work authorization – here a green card – to which he was entitled.

What's the lesson of the *Fendi* case? All employers have affirmative obligations under IRCA to ensure employees' current legal work status. However, if that status changes, employers must explore reasonable alternatives to permanent termination or else be prepared to defend a discrimination suit like that pursued by Incalza. If a discrimination plaintiff can point to available alternatives to termination – such as the leave of absence requested by Incalza – the employer will be at a distinct disadvantage when and if litigation results.